Southwestern Broadcasters, Inc. *and* American Federation of Television and Radio Artists, San Diego Local, AFL-CIO *and* National Association of Broadcast Employees & Technicians, AFL-CIO, CLC. Cases 21-CA-18391 and 21-CA-18516

March 26, 1981

DECISION AND ORDER

On November 3, 1980, Administrative Law Judge Michael D. Stevenson issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party, National Association of Broadcast Employees & Technicians, AFL-CIO, CLC, filed exceptions and supporting briefs, and the Respondent filed answering briefs to the respective exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order.

We agree with the Administrative Law Judge that the General Counsel failed to establish that the Respondent is a successor to Retlaw Broadcasting or that it had a duty to bargain with the unions which had represented certain employees of Retlaw. At no time did the Respondent hire, or indicate that it planned to retain, a majority employee complement in the bargaining units in which Retlaw employees constituted a majority,[1] and at no time subsequent to its acquisition of Retlaw did either union represent a unit majority. We further agree with the Administrative Law Judge that the General Counsel has not proved that the Respondent sought to avoid a bargaining obligation by unlawfully refusing to hire a sufficient number of Retlaw employees to maintain or establish majority status. We also note that the supervisory hierarchy under Retlaw was replaced, which further militates against a finding of successorship. *J-P Mfg., Inc., successor to Traverse City Manufacturing, Inc.*, 194 NLRB 965, 968-969 (1972). We agreee that, in these circumstances, the Respondent is not a successor to Retlaw. *Bengal Paving Co.*, 245 NLRB (1979); *Industrial Catering Company, Division of Merrill's Restaurant, Inc.*, 224 NLRB 972, 979 (1976).

[1] In view of our disposition herein, we find it unnecessary to pass on the Administrative Law Judge's additional grounds for concluding that the Respondent is not a successor to Retlaw.

Chairman Fanning concurs in the result here, but he does not believe that in every case there must be an absolute majority of the predecessor's employees before a duty to bargain can be found. See *United Maintenance & Manufacturing Co., Inc.*, 214 NLRB 529, 536, fn. 21 (1974), and cases cited therein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge: This case was heard before me at San Diego, California, on June 10 and 11, 1980,[1] pursuant to an order consolidating cases and a consolidated amended complaint issued by the Regional Director for the National Labor Relations Board for Region 21 on February 1, 1980, and which is based on charges filed by American Federation of Television and Radio Artists, San Diego Local, AFL-CIO, in Case 21-CA-18391, and by National Association of Broadcast Employees & Technicians, AFL-CIO-CLC in Case 21-CA-18516 (herein called AFTRA and NABET respectively), on November 9 (21-CA-18391) and December 20 (21-CA-18516). The complaint alleges that Southwestern Broadcasters, Inc. (herein called Respondent) has engaged in certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (herein called the Act).

Issues

The issues presented are: (1) Whether Respondent as the present owner of Radio Station KOGO is a successor employer; or (2) whether Respondent, in order to avoid the legal status of successor employer, refused to hire one or more persons formerly employed by Retlaw Broadcasters, Inc., at Radio Station KOGO.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel, AFTRA, NABET, and Respondent.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a Georgia corporation which owns and operates Radio Station KOGO, located in San Diego, California, and owns and operates other radio stations located in San Antonio, Texas, Phoenix, Arizona; Brighton, Colorado; and Santa Ana, California. It further admits that during the past year, in the course and conduct of its business that its gross volume exceeded $100,000 from advertising national brand products over the air. Accordingly it admits, and I find, that it is

[1] All dates herein refer to 1979 unless otherwise indicated.

an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that American Federation of Television and Radio Artists, San Diego Local, AFL-CIO, and National Association of Broadcast Employees & Technicians, AFL-CIO-CLC, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

This case arises out of a sale of assets of Radio Station KOGO, by the former owner, Retlaw Broadcasting, to Respondent on or about September 19. Prior to this sale Retlaw was a party to collective-bargaining agreements between itself and AFTRA, representing generally the technical and engineering employees. These contracts have been in force and effect since before 1970. All parties agree that said employees were grouped together in units appropriate for collective bargaining under the Act, but Respondent denies that the status of these units continued after Respondent purchased the assets of KOGO. The parties also agreed that since October 2 for AFTRA and since September 21, for NABET, these Unions have demanded that Respondent recognize them and bargain with them as exclusive representatives of employees contained within the units described generally above. Respondent has refused these requests and further admits that since September 19, as more fully described below, it instituted changes in terms and conditions of employment without bargaining with AFTRA or NABET.

At hearing, the president of Retlaw, Joseph C. Drilling, testified that during the spring Retlaw decided that it was unable to earn adequate profits in the San Diego radio market as it owned only KOGO, an AM station. According to Drilling, to attract sufficient advertising dollars required ownership of both AM and FM stations in the same locality. Accordingly, Retlaw decided to concentrate such assets as it had in television and engaged the services of a broker to find a buyer for KOGO. Ultimately, the broker submitted two bids for purchase of KOGO, one of which was from Respondent. Negotiations on various details followed, including discussions regarding the futures of certain KOGO management employees. Then on April 18, an agreement for sale and purchase of KOGO was signed. The actual closing was not to occur until September 19, and Respondent was scheduled to commence operation of KOGO on September 20.[2]

At the time it agreed to purchase KOGO, Respondent owned KPRI, a nonunion FM station in San Diego. The general manager of KPRI and a lengthy witness at hearing was Dex Allen. He first learned of KOGO's availability in March, when he received a telephone call from Ed Shadek, a principal of Respondent. The latter had been contacted by the broker wanting to know whether Respondent was interested in acquiring an AM station. Allen advised Shadek to pursue the matter and ultimately agreement was reached with Retlaw.

Drilling testified that in his preclosing discussions with Shadek, only three KOGO employees were specifically discussed: Jerry Jackson, station manager; U. A. Altman, sales manager; and Bill Dodd, program director. None of these was to be retained by Respondent. In addition, the contract of sale provided that Respondent would assume two personal service contracts for two radio personalities, Ken Cooper and Ernie Myers. As to the remaining KOGO employees, Drilling had no prior knowledge as to who, if any, would be retained by Respondent nor under what circumstances. Shadek had indicated that some KOGO employees would not be retained and, after negotiations, Drilling agreed to notify those not to be retained and to pay them severance pay. On September 19, Drilling received from Allen a document entitled "Retlaw KOGO Employees." It reads as follows:

To be terminated

Altman	Leland
Becerra	Martel
Dodd	Mcculoch
Ebbert	Neill
Edington	Smith
Graue	Stockton
Hearn	Swearingen

The names on the list were placed thereon as a result of discussions primarily between Allen and Charles Brinkman, KOGO's new program director. To a lesser degree, others contributed suggestions on which employees should be retained. Drilling read the names to Jackson while both men were riding in Drilling's car and subsequently Jackson notified the individuals concerned that their names were on the list.

In the opinion of Drilling, Respondent was aware of the two collective-bargaining agreements before it agreed to purchase KOGO. Drilling could not recall any specific discussion of this point during the several negotiating sessions which occurred. However, Exhibit C to the agreement for purchase and sale of KOGO (April 18, 1979) specifically lists the two Union's contracts (pp. 3 and 4) as "material Contracts and Commitments of Seller with respect to KOGO." (NABET Exh. 1.) Unlike the two personal service contracts referred to above, the two collective-bargaining agreements with the Unions were not to be assumed by Respondent. Respondent asked Drilling to operate KOGO through midnight of September 19 and the latter agreed as a courtesy. At 12:01 a.m. on September 20, KOGO went off the air for approximately 30 hours because Respondent was installing a new transmitter and doing some work on phasing equipment which could only be done when the station is off the air. Respondent was informed by its FCC attorney that the hiatus was not unlawful.

Three Retlaw employees testified at the hearing. All were members of the unit represented by AFTRA. Cynthia Heath Kerrigan worked for KOGO from May 1977 to September 19, primarily in the news department. She

[2] For reasons I find immaterial to this case, the originally scheduled closing date of September 18 was delayed for 24 hours.

first learned of the sale of KOGO in the summer through the "grapevine." This was followed shortly thereafter by memorandum formally announcing the sale. On September 19, Kerrigan received a phone call at home about 3 p.m. from Ken Graue, the news director, telling her that the list of employees not to be retained had been made public. With the exception of Kerrigan and Rob Branch, the entire news department was to be replaced. Prior to this announcement, Graue has told Kerrigan and her colleagues in the news department on two occasions that it looked like the new owners of KOGO would expand the news department and no one should worry about his or her job. On September 20, Kerrigan reported for work and met Allen for the first time. He told her that a meeting with Brinkman and a meeting with Ted Tillatson, the new news administrator, had been scheduled for later that day. Allen concluded the brief meeting by telling Kerrigan to enjoy the remainder of the day off with pay.

At 12:30 p.m., Kerrigan met Brinkman in his office and he began the conversation by saying, "We are not recognizing the union." Then he told her that they had a new agreement for her to sign which he handed to her. This document contained terms and conditions of employment different from those which Kerrigan had worked under at Retlaw. (The exact differences do not appear of record.) The document reads as follows:

SBI-KOGO, INC.

1. Your salary is: $451.00 per week for a 5-day week, plus a weekend air shift of 6 hours paid at $8.00 per hour.

2. Each air personality will be available for one full hour production each day, Monday through Friday. (i.e., commercials — plus station promo's).

3. All KOGO air personalities to record commercials to run in all dayparts/shifts throughout the broadcast day.

4. Any "Spec" commercial production — recorded, sold and subsequently *aired* deliver a $30.00 talent fee paid to the announcer/talent for each 13 week run. This fee entitles the client to use this spot on KOGO only. Two or more stations deliver a $60.00 talent fee per 13 week cycle. All fees paid by the client to KOGO with billing.

5. All employees of SBI-KOGO, Inc., accept employment under these conditions and each employee's performance will be reviewed after a 6 month period.

6. Vacations and benefits:

One year to Five years — Two weeks
Five years to 10 years — Three weeks
Over ten years — Four weeks

Hospitalization benefits attached from Cal Western Life Insurance

7. One weekend off every five weeks, rotated equally—other jocks to cover.

When Kerrigan expressed disapproval of some of the proposed terms and conditions, Brinkman said they were necessary because the station was losing money. Kerrigan asked for time to consider the offer of employment and Brinkman agreed, but stated that he wanted the signed document returned to him that day.

Kerrigan participated in a second meeting later that day with Tillatson and Betsy Neuboff of the KPRI news department and Branch, who also had been retained. Tillatson told Kerrigan that the format of KOGO's news coverage would change. The emphasis would be on local and consumer interest stories. News conferences would be covered by telephone only. No longer would KOGO cover violent crimes, courts, or city council or board of supervisors meetings.

The next day Kerrigan reported for work at 11 a.m. and met with Brinkman. She told him that she was ready to work under AFTRA's stipulations, but she had not signed the employment agreement given to her the day before. Brinkman again told her, "We do not recognize the Union." She told him, "That's immaterial, it exists and it's binding." Brinkman denied that it was, and then asked Kerrigan whether her statements meant that she had decided not to sign the offer. She told him she would not sign and then she asked about severance pay and Brinkman responded, "You were never employed here, we owe you nothing." Kerrigan left and was never paid for September 20. In October, Kerrigan secured employment as news director at Radio Station KCBQ, San Diego, and has worked there up to the date of hearing.

Another witness at the hearing was former KOGO announcer and disc jockey Don McCulloch. He worked at KOGO from March 1977 to September. Like Kerrigan, McCulloch first heard of the station's probable sale in early to mid-1979. About a week before Respondent assumed control of KOGO, McCulloch ascertained that Allen would be the new manager of the station and called him at KPRI. McCulloch stated that he had received an offer from a radio station in Denver, but that he "didn't want to walk away from a winner." Would he, asked McCulloch, "at least have a chance to make the team?" Allen responded, "I like your attitude; I can't tell you too much but when we come in and take over KOGO, we're going to sit down with the Ken Coopers and with the Don McCullochs." Allen also said that there would be some changes made as there were some problems with the AM sound. McCulloch agreed that problems existed involving a lack of direction "on behalf of the program director, a lack of structure there, that I felt would improve the station"; also a "loose format." To Allen's statement that McCulloch would have a chance to make the team, McCulloch responded that this was "only fair." On the basis of Allen's representations, McCulloch "decided to take [his] chances and stay at KOGO and see what would happen."

On September 19, McCulloch learned from Jackson that his name was on the "To be Terminated" list referred to above. After learning this, McCulloch had a conversation with Brinkman about 6 p.m. on September 19 at KOGO. Cooper was present when McCulloch introduced himself to Brinkman who said he had heard about McCulloch from Allen. McCulloch said, "I guess we're not going to get a chance to talk after all." Brinkman answered, "Not necessarily. I don't know if you've

heard or not, but we're not recognizing the Union." McCulloch said that he had not heard that. Brinkman continued that he did not like to do it that way, because he was caught shorthanded too. "[W]e are doing it for legal reasons on the advice of our labor attorneys."[3] Brinkman also explained that the terminations and the hiatus in operation of the station were necessary because it was not a carryover; "They weren't like taking on the old station but it would be the end of one station and the beginning of a new one." Brinkman then assured McCulloch that the new managers had no particular objections to his air sound and that McCulloch should be in touch about 30 days later.

A few moments later, McCulloch spoke to Allen in another room. He was introduced to Allen by Bill Zoeller, KOGO's chief engineer who was retained by Respondent. McCulloch told Allen that he had just spoken to Brinkman and had been told that "the terminations were done strictly for legal reasons." To this, Allen responded, "That's right and if I were you, I would give him a call back in about five days or so."[4]

As matters turned out, McCulloch never called anyone back at KOGO, because 1-1/2 weeks after his termination he secured employment at station KSGO where he remained until late November. Thereafter, McCulloch was and remained unemployed through the date of hearing.

In rebuttal, Richard Ebbert testified for the General Counsel. Currently unemployed, the witness was listed on the "To be Terminated" list referred to above. On or about October 19, Brinkman called him and asked him to come in for an audition and interview. Ebbert did as requested, and was subsequently offered employment by Brinkman. This was to be at Ebbert's old salary, and, at Ebbert's insistence, not more than 40 hours per week. Brinkman agreed and Ebbert returned to KOGO until March 1980.

In its case, Respondent presented two witnesses: Brinkman and Allen. Brinkman testified that he had previously worked with Allen in 1964. In July, Allen called him in Pittsburgh, Pennsylvania, where he had been employed for several years, and asked whether he was interested in a new position at KOGO. After due consideration, Brinkman agreed and arrived in San Diego the evening of September 18, 1 week later than originally agreed, because Brinkman's employer had asked him to finish up some matters before leaving. Brinkman's account of the Kerrigan and McCulloch conversations was basically as reported above. Brinkman did add that Kerrigan asked for the position of news director and also attempted to describe to Brinkman what Kerrigan believed to be serious problems in the operation of the newsroom. But Brinkman stated he was unable to make decisions then due to his unfamiliarity with the operation and he asked her to defer the conversation until later. According to Brinkman, the only issue was for Kerrigan to decide whether she would sign the employment agreement.

Brinkman, himself an AFTRA member, testified to one or more of his telephone conversations with Allen after the former had been officially hired. Allen told him of the existing AFTRA and NABET contracts, but also said that Brinkman would not inherit them.

Dex Allen, general manager of KPRI and KOGO, also testified for Respondent. Much of his testimony dealt with the economics of operating a radio station in general and KOGO in particular. According to Allen, KOGO was in poor financial condition prior to its purchase by Respondent. Its ratings were approximately 50 percent lower than KPRI. Its revenues were correspondingly low. This was due to a combination of factors. KOGO was not paired with an FM station and consequently could not sell its advertising at a favorable rate; KOGO had been in the process of sale for several months, thereby deterring potential advertisers; KOGO had lost its exclusive broadcasting rights to the San Diego Padres major league baseball games in 1978. Like Kerrigan and McCulloch, Allen also stated that KOGO, under Retlaw, had very poor management. This caused an unattractive format involving the programming of music and news, inadequate sports reporting, overstaffing and unappealing radio personalities. After Allen was informed that Respondent had signed a contract to purchase KOGO, he and Shadek, and by the summer, Brinkman, set out to correct the business problems perceived by Respondent's management. I will detail and discuss these actions below.

B. *Analysis and Conclusions*

I begin with the case of *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249 (1974). There, as in the instant case, a bona fide sale of assets occurred. Despite an existing collective-bargaining agreement with the seller, the Court held that the purchaser was not bound by the contract and had no duty to hire all the employees of the predecessor though it is possible, the Court stated, that such an obligation might be assumed by the employer.[5] In this case, said obligations were never assumed by Respondent. However, if Respondent is found to be a successor employer,[6] then the duty to recognize and to bargain with the unions, and possibly other obligations, are imposed upon it by operation of the law.

[3] There is some confusion in the record as to the antecedent of "it" in the statement quoted. See discussion of this point below.

[4] Allen, but not Brinkman, denied making their respective statements to McCulloch regarding "legal reasons." I find that Allen did make this statement to McCulloch as I find the latter to be a more credible witness on this point. In addition, Zoeller was a witness to the Allen-McCulloch conversation and, despite the fact that he was employed by Respondent at the time of hearing, was not called as a witness. This raises an adverse inference that, if called, Zoeller's testimony would not have supported Allen on the denial. However, again I point out there is some confusion as to just what was done for "legal reasons."

[5] See also *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

[6] AFTRA argues that because its contract with Retlaw contained a clause purporting to bind successors, and because Respondent had knowledge of the entire contract prior to purchase of KOGO, then Respondent is bound by the provisions of the contract as a successor. Such a claim is foreclosed by *Howard Johnson Co.* v. *Hotel Employees, supra*, 417 U.S. 258, fn. 3.

1. The alleged substantial continuity of the employing industry

In determining whether successorship exists, the keystone is whether there is a substantial continuity of the employing industry.[7] Continuity of the employing industry requires consideration of the work done as well as consideration of the work force. More specifically, if the essential nature of the business continues following the transfer and if a majority of the purchaser's work force is composed of the predecessor's employees, then there is a successorship.[8]

With the above as a guide, I turn first to the nature of the business and the work done in this case. Before and after the sale, the business of KOGO was to entertain its listeners within the same geographical area by presentation of music, news, and sports in a particular format.[9] However, within KOGO's format some differences are apparent under Respondent. In the field of music, KOGO played "adult contemporary" music. Witnesses McCulloch and Allen agreed that before and after the sale the nomenclature of the music stayed the same, but Allen testified the music changed. He did not say how and I find that the music stayed essentially the same. Both agreed that the play list was shortened and more familiar music was played. I find these differences to be insignificant. As to the news, the changes before and after the sale were more significant. According to Kerrigan, before the sale KOGO covered action on the street such as violent crime, SWAT actions, court proceedings, and local government. After the sale, the coverage of news was entirely revamped with emphasis placed on coverage of local civic events, consumer affairs, and commentaries. News conferences were covered by telephone only. I find these changes to be significant. The only evidence presented suggesting the changes in news were pretextual was the retention of Rob Branch, whom Kerrigan described as the most "Blood and Guts" reporter on KOGO's prior news staff. However, neither she nor anyone else testified that the news format did not change. As to sports, the evidence showed that after the sale, a sports director was hired, whereas before, there had been no sports director.[10] Since 1978 when KOGO had lost its right to broadcast baseball, there had been no sports presentation. Under Respondent's new sports director, this changed, and various sports events were broadcast.

Other changes in the nature of the business under Respondent can be described: the station's logo or signature was changed to "Radio Six" and Respondent increased the frequency of the call letters. The demographics of the station were lowered to a younger audience than before the sale by the changes in the programming format and, consequently, the advertising shifted to appeal from the 45-plus audience before, to the 24–34-year audience under Respondent. In this respect, because Respondent was able to offer its advertising customers spots on both its AM and FM broadcasts, its revenues increased beyond what both stations earned before the sale. As explained by Allen, under "combination selling 1 + 1 may well equal 3."

At 12:01 a.m. on September 20, KOGO went off the air for approximately 30 hours. Some cases hold that a significant interruption or "hiatus" in business operation after the sale is a factor in deciding whether a successorship exists.[11] The time involved here is not significant and is consistent with a successorship. However, the reason for the signoff is of more importance. Respondent installed a new transmitter and modified some existing equipment as part of its acquisition of KOGO. This is important because the use of new equipment by the purchaser is a factor against a finding of successorship.[12] In this case, it is also important that Respondent intended to consolidate its KOGO and KPRI operations to a new location in December, but as a result of construction delays and problems with the lease, this move did not occur until April 1980.

Up to this point, I find a close question presented on the issue of successorship, but in turning to the question of retention of Retlaw's work force, the issue resolves itself, overwhelmingly, in my judgment, against a finding of successorship. I begin with a list of 12 AFTRA employees and their classifications and the three NABET employees:[13]

Retlaw-Kogo Employees—September 18, 1979

Aftra Unit

Rich Ebbert	News
Rick Martel	D.J.
Ken Graue	News
James Neill (Day)	D.J.
Roddie Stockton	D.J.
Tom Leland	D.M.
Cynthia Heath	News
Rob Branch*	News
Ernie Myers*	D.J.
Ken Copper*	D.J.
Ian Rose*	D.J.
Bill Moffitt*	D.J.

Nabet Unit

Robert Smith
John Edington
Alfred Becerra

Of the employees listed above, those marked with * were actually hired by Respondent; Kerrigan was offered employment, but declined;[14] and Leland would probably

[7] *Saks & Company d/b/a Saks Fifth Avenue*, 247 NLRB 1047 (1980).

[8] *Westwood Import Company, Inc.*, 251 NLRB 1213 (1980).

[9] According to McCulloch, a "format" is the type of programming the station puts on the air to appeal to their target audience.

[10] This was Tom Nettles, who was one of several KPRI employees brought to KOGO.

[11] See, e.g., *Mondovi Foods Corporation*, 235 NLRB 1080 (1978).

[12] See *Alcoholism Services of Erie County, Inc.*, 236 NLRB 927 (1978).

[13] Some clarification is in order on two points. First, McCulloch was inexplicably omitted from the list; yet he was a member of AFTRA. Second, the reason that the NABET employees did not have classifications indicated is that they were all engineers.

[14] The General Counsel argues that Kerrigan was constructively discharged when Respondent offered her employment on terms different from those under the AFTRA contract with Retlaw. I disagree and find

Continued

have been offered employment, but for the information conveyed to Allen by Jackson that Leland did not desire continued employment in the San Diego area. Thus, out of the 13 employees in the AFTRA unit, Respondent hired 5, offered employment to 1, and may have hired 1 other but for Respondent's belief based on uncontroverted evidence that he was not available.[15] None of the NABET unit were retained nor offered employment.

The critical date for determining the Union's majority status is the date on which the requests for bargaining were received by the Employer.[16] In this case, as described above, the AFTRA demand was received on October 2 and the NABET demand was received on September 21. The record shows that by October 2 for AFTRA five unit employees had been retained as indicated in the list above. In addition, five KPRI employees were brought to KOGO for employment while continuing their former assignments: (1) Tom Nettles—KOGO sports director; (2) Ted Tillatson—KOGO news administrator; (3) Ed Beauchamp—KOGO part-time air shift personality; (4) Betsy Neuboff—KOGO news reporter; and (5) Paul Goldstein—KOGO part-time all night air-shift personality.

Still others were hired from the outside:

(1) Brinkman, while KOGO program manager, was also employed as an air personality.

(2) Craig Austin, hired by Brinkman on recommendation of a mutual friend as on-air personality for the 7 p.m. to midnight shift.

(3) Bill Michaels, hired as weekend air personality. He had formerly worked for KPRI and had been a satisfactory employee.

Under this breakdown of employees, Respondent neither hired a majority of the former AFTRA-NABET unit members, nor, in the case of AFTRA, did the five employees retained by Respondent constitute a majority of Respondent's on-air personalities.[17] Assuming *arguendo*, that the former 13-member AFTRA unit survived the sale of assets, 8 of the new air personalities clearly never voted for the Union and their support could not be presumed, under any legal theory or precedent, to continue after Respondent took over KOGO. Assuming the NABET unit survived, the analysis is even more striking. None of the three unit members were retained and Zoeller, the former chief engineer, was performing most of the work formerly performed by the three unit members. Zoeller, of course, never voted for the Union and his support could not be presumed to continue. In fact, for both units I will find below that the former units are no longer appropriate. For now, I find that the evidence does not show the requisite majority for a successorship.[18]

A purchaser of assets, like Respondent, which has not agreed to be bound by its vendor's contracts or to employ its workers or to bargain with their union, need not hire those workers. The decisions require that, in such a case, and absent a refusal to hire because of antiunion animus—a sharply contested issue here—a majority of the work force of the purchasing employer in the unit be former employees of the seller in that unit. But when the successor employer has never employed in the unit a majority of its workers who are former employees of the predecessor, there is no duty to bargain.[19]

2. The alleged antiunion motivation in Respondent's failure to retain the former unit members

The General Counsel and the two Unions contend that to the extent the required majority concept is not satisfied in this case, Respondent declined to hire the former unit member due to union animus.[20] I reject this argument as unsupported by the record, to which I now turn.

I begin with the statements made by Brinkman and Allen. Basically, Brinkman told both McCulloch and Kerrigan that Respondent was not recognizing the Union. Allen told Brinkman that he would not be inheriting the union contracts. These statements are basically neutral, consistent, and informational, and do not raise inferences supporting the General Counsel's case. There is some evidence that Respondent's counsel participated in decisions on who to retain from Retlaw. No case is cited to show that consulting with one's counsel is evidence of wrongdoing in a labor dispute. If any inference flows, it would be that Respondent sought to avoid unlawful acts by consulting with its attorney.[21] The last-minute replacing of radio personalities is explainable by Brinkman's arrival in San Diego on September 18, rather than 1 week before, as originally planned. This delayed arrival caused great confusion because of Respondent's plans to make certain changes in its format as described above. All of the above is completely nonpersuasive of Respondent's alleged animus, but there is some evidence that requires special attention.

McCulloch testified that Brinkman told him in a conversation on September 19, about 6 p.m., as follows:

> I don't know if you've heard or not but we're not recognizing the Union . . . . He didn't like to do it that way but they were doing it for legal reasons on the advice of our labor attorneys. I'd rather do it another way because I'm caught shorthanded too.

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that, assuming no antiunion motivation as I will find below, Respondent could vary the terms and conditions of employment offered, or could decline to offer her employment at all. *Pacific Hide and Fur Depot, Inc.* v. *N.L.R.B.*, 553 F.2d 609, 611 (9th Cir. 1977); *N.L.R.B.* v. *Burns International Security Service, Inc.*, *supra* at 294.

[15] Moreover, on September 19 McCulloch was told by Allen to call Brinkman back within 5 days to see whether he would be hired. McCulloch never called back because he accepted other employment. This evidence further weakens the General Counsel's theory of Respondent's refusal to hire Retlaw employees due to antiunion motivation and in order to evade the duty to bargain as a successor.

[16] *Pre-Engineered Building Products, Inc.*, 228 NLRB 841, fn. 1 (1977), enforcement denied 603 F.2d 134 (10th Cir. 1979).

[17] AFTRA states in its brief without citation to the record, or other elaboration, "the retained AFTRA unit employees continued to be an actual majority of the on-air employees of KOGO, after September 19, 1979." This statement cannot be credited.

[18] Compare *N.L.R.B.* v. *Band-Age, Inc.*, 534 F.2d 1 (1st Cir. 1976).

[19] *Pacific Hide & Fur Depot* v. *N.L.R.B.*, *supra*, 553 F.2d 611.

[20] *Howard Johnson Co.* v. *Hotel Employees*, *supra*, fn. 8.

[21] Thus Respondent may have asked its attorney whether it was required to retain all former KOGO employees. All parties agree that such is not the law. Yet a mistake in procedure may raise the inference of unlawful motivation. In a case like this, competent legal advice is indispensable.

I have tried to put McCulloch's testimony relating to "legal reasons" fairly in context. Later, McCulloch testified that Allen confirmed that terminations were done for legal reasons, although Allen denied saying this. In analyzing this testimony, I must find that Brinkman never made that exact statement attributed to him. Witness the cross-examination of Brinkman by Mr. Phillips, attorney for NABET:

> Q. Did you tell Mr. McCulloch that KOGO would be signing off for legal reasons?
>
> A. Yes.
>
> Q. What legal reasons did you have in mind?
>
> A. I didn't have any. I was just told that we were signing the station off at midnight.

Only one reference to "legal reasons" was mentioned in Brinkman's direct testimony and Phillips' interpretation of it is confusing. McCulloch was never brought back in rebuttal. Moreover, even if McCulloch's original testimony was found to be credible, there is no evidence that McCulloch asked what was meant by "legal reasons" for his termination. Of course, McCulloch was told by Allen to call back in 5 days, but he failed to do so. I conclude and find this evidence is too ambiguous and not sufficient to establish Respondent's unlawful motive, particularly when considered with all the evidence of record.[22]

Other evidence is alleged to show Respondent's unlawful motive. For example, at footnote 1 of its brief, NABET contends that the testimony of witness Jean Bargmanf, a NABET union official, is important. Her testimony purported to relate a telephone conversation between herself and Drilling on September 20. Drilling allegedly told her that it was his opinion that Respondent desired to rid itself of both unions and had decided that terminations of selected employees were the best way to do it. Over Respondent's objection, I permitted the testimony to stand "for whatever it's worth." I conclude now that the value of this testimony is nil and discredit it *in toto*. Drilling was the General Counsel's first witness. He was not called as an adverse witness. He concluded his testimony in barely enough time to catch a plane back to his home. Bargmanf was called the same day, long after Drilling had left. In addition, Phillips represented, in response to my concern about lack of an adequate foundation having been laid with Drilling, that either he or counsel for AFTRA had asked Drilling whether he ever told anyone that he thought that Respondent was trying to get rid of the Union. I can find no such question having been asked of Drilling. Thus, the failure of NABET to lay an adequate foundation or preferably to call Drilling as its own witness under Section 611(C) of the Federal Rules of Evidence, to determine whether he made the statement and more importantly, the factual basis for it, renders the Bargmanf testimony of no value in proving illegal motivation.

[22] I am aware of the rule that ambiguous statements must be resolved against the promulgator. Cf. *N.L.R.B.* v. *Harold Miller et al., d/b/a Miller Charles & Co.*, 341 F.2d 870, 874 (2d Cir. 1965). But that rule does not fit here to raise an inference in support of the General Counsel's case. The surrounding circumstances of the testimony in issue, as indicated in the text of my Decision above, combine to render the statement of little or no probative value.

In discussion of Respondent's alleged unlawful motivation, it is necessary to discuss briefly the special nature of the entertainment profession. As to the AFTRA unit, there is clearly a pronounced subjective element to the hiring process.[23] While subjective considerations should not be used as pretext for antiunion motivation, in this case all seem to agree that the entertainment business is a high risk, insecure profession. Thus, Brinkman was brought to San Diego from Pittsburgh, because several years before he had impressed Allen when they worked together. Allen described Brinkman's past employment compared to many others in the radio business:

> Well, he had been in the same market for almost 19 years. He had only worked at two radio stations which in this business is phenomenal, most people move every year, year and a half, two years. The longevity is not exactly like it is in other business.

McCulloch, too, indicated an understanding of the subjective factors in the selection process when he testified that, after Allen told him he would have a chance to make the team, McCulloch testified:

> On the basis of that, I decided to take my chance and stay at KOGO and [see] what would happen.[24]

Still other evidence in the record reflects the insecure motive of radio work. After leaving KOGO, McCulloch worked for another station in the area for about 2 months and has apparently been unemployed since. Ebbert was rehired by KOGO in October and remained there until March of 1980. He also has apparently been unemployed since.

However, as a court said in another context:

> It is precisely because such an evaluation, highly subjective as it is, may mask racial bias that it must be vigorously reviewed.[25]

As a vigorous review failed to find evidence of racial bias in *Milton*, so too has my "vigorous" review failed to find evidence in this case of unlawful motivation in the decisions on retention.

The hiring decisions were not based completely on subjective factors. Respondent also had the benefits of reports prepared by an experienced AM radio consultant and by a radio research group. While these reports were referred to in the testimony, they were not offered into evidence. General Counsel suggests that their utility may have been pretextual because apparently "no one recommended by these studies was subsequently hired." In response to this claim, I note that the reports were in possession of Respondent's counsel at hearing and the

[23] Allen testified the hiring decisions were made as the result of input from consultants, from the researchers, and what might be considered "common sense or . . . gut feeling."

[24] Kerrigan, of course, has the same right to subjective impressions of her colleagues. However, her descriptions of fired news director Graue, as a "Walter Cronkite" of the San Diego area, or of retained colleague Rob Branch, as the most "blood and guts" reporter under AFTRA is not convincing evidence of unlawful motives by Respondent in retaining some employees, but not others.

[25] *Milton* v. *Bell Laboratories*, 428 F.Supp. 502, 507 (D.C.N.J. 1977).

record does not show that anyone was denied access to them. As to how they were used by Respondent, some of the AFTRA unit members not retained by Respondent were found by the consultant and research group to be ineffective and unpopular, e.g., Martel and McCulloch.

As to the three employees in the NABET unit, they were not retained because, according to Allen, they were not needed. Respondent intended to operate KOGO under William Zoeller and KPRI under Joe Semac. Zoeller had been chief engineer under KOGO before Respondent took over and Semac had been KPRI engineer both before and after. Thus Respondent hired no new engineering employees to perform the work formerly done by the nonretained engineers, Smith, Edington and Becerra. General Counsel concedes this, but then contends that because the production work formerly done by the three mentioned above, was, after Respondent took over, performed by KOGO on-the-air employees this shows a linkage between Respondent's unlawful conduct with respect to the AFTRA employees, and the failure to retain the NABET employees. This argument has several defects: First, I have found no unlawful motivation with respect to the AFTRA employees; next, for a period of time under Retlaw, McCulloch did engineering work while he was working on the air as a disc jockey. Thus the precedent was firmly established. Finally, Rose and Michaels, the former retained, the latter newly hired, had ability to perform some engineering tasks which was a factor in their hiring. This ability contributed to Respondent's economic motivation to reduce costs by consolidating jobs, a clearly defensible objective which was begun to a limited degree under Retlaw with union approval.

In sum, I have found no successorship and no unlawful motivation with respect to Respondent's retention of certain employees but not others.[26] Consequently, I am also constrained to find that Respondent has not violated the Act.[27] To the reasons and analysis reflected above, I add a few additional reasons which support my central conclusions. First, Respondent replaced its three highest ranking executives, station manager, program director, and sales manager. Replacement of supervisors detracts from the continuity of the employing industry and is a factor supporting a finding of no successorship.[28] Second, selection of the Unions in this case occurred prior to 1970 when Retlaw was presumably operating with its full complement of employees. In the instant case, Respondent "homogenized," i.e., combined its KOGO staff with many employees from KPRI, a nonunion station. Thus in the case of NABET, the unit has ceased to exist entirely, and in the case of AFTRA, it is too speculative to presume that when KOGO resumed operations under Respondent, a majority of its employees desired or even anticipated representation by the Unions. I also find that, after Respondent assumed control of KOGO, the appropriate units under Retlaw did not continue. I agree in part with the analysis of this point made by Respondent. That is, the dubbing function located in the NABET engineering unit by Retlaw was done by on-air production people by Respondent. The on-air function of KPRI was partially combined with that of KOGO as a substantial number of on-air employees (5 out of 13) worked on-air at both stations. In this respect I believe the community of interest formerly shared by AFTRA members under Retlaw would not be extended to KOGO-KPRI on-air performers. That is, these two stations would be considered joint-employers as of September 19.[29]

Anticipating my finding of joint employer above, the General Counsel contends that even assuming that KPRI and KOGO constitute a single employer, it does not follow automatically that the employees of the two stations constitute a single appropriate unit. The General Counsel goes on to fault Respondent for failing to produce evidence as to how many employees were employed at KPRI on September 20, who would be included in the new overall unit. While I agree that the record does not reflect how many KPRI employees were employed as of September 20, this misses the point. The issue is not whether there is an appropriate unit under Respondent, but only whether the old unit endures. The fact is that the AFTRA and NABET units ceased to exist because the operational structure and practices of Respondent differed significantly from Retlaw.

Based on all the reasons discussed above, I will recommend that this case be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent Southwestern Broadcasters, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. American Federation of Television and Radio Artists, San Diego Local, AFL-CIO, and National Association of Broadcast Employees and Technicians, AFL-CIO-CLC, are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

[26] Compare *C.J.B. Industries*, 250 NLRB 1433 (1980). I have also analyzed the Respondent's failure to retain the unit employees here in terms of the guidelines for discharge cases announced in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). However, since I cannot find a *prima facie* case of discrimination, further reference to Wright is unnecessary in the instant case.

[27] Thus Respondent had no duty to recognize and bargain with the Unions, nor did Respondent violate the Act in changing the terms and conditions of employment offered to any unit employee.

[28] See *J-P Mfg., Inc., successor to Traner Manufacturing, Inc.*, 194 NLRB 965, 969 (1972).

[29] *Parklane Hosiery Company*, 203 NLRB 597, 612, amended on other grounds 207 NLRB 999 (1973). Thus KOGO-KPRI had a functional interrelation of operations; a centralized control of labor relations; common management and common ownership or control. See also *L. E. Davis, d/b/a Holiday Inn of Denton* v. *N.L.R.B.*, 617 F.2d 1264 (7th Cir. 1980).

ORDER[30]

It is hereby ordered that the complaint be, and it hereby is, dismissed in its entirety.

[30] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.